STATE OF MICHIGAN

COURT OF APPEALS

YOLANDA THOMPSON, Individually and as Next Friend of TYLESHA TEMPLE, LAMONT'E RICE, and CIERIA THOMPSON, Minors, and PAUL ROWELL, Individually,

Plaintiffs-Appellees/Cross-Appellants,

v

RONALD FREEMAN,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
September 4, 2008

No. 273197
Wayne Circuit Court
LC No. 04-411393-NZ

Before: Murray, P.J., and Bandstra and Fort Hood, JJ

PER CURIAM.

Defendant appeals as of right the trial court's order awarding damages to plaintiffs for violations of MCL 600.2918 (commonly referred to as the "anti-lockout statute"). Plaintiffs cross-appeal the same order. We affirm the order insofar as it awards economic damages to plaintiff, Yolanda Thompson ("Thompson), but reverse the portion of the order awarding economic damages to plaintiff, Paul Rowell, and noneconomic damages to Thompson and to plaintiffs, Tylesha Temple, Lamont'e Rice, and Cieria Thompson ("Cieria"). We remand this case and order the trial court to award Rowell, Temple, Rice, Cieria $200 each under the anti-lockout statute and to consider whether Thompson was entitled to treble damages under the anti-lockout statute. Further, on remand, the trial court should determine the propriety of an award of attorney fees under the Michigan Consumer Protection Act ("MCPA"), MCL 445.901 *et seq*.

This cases arises out of plaintiffs' claim that defendant wrongfully evicted them from the house Thompson was leasing from defendant. After a default judgment was entered, the trial court held multiple evidentiary hearings and rendered a damage award. On appeal, defendant claims that the damages awarded to plaintiffs were speculative as the evidence was insufficient to support the awards. We agree, in part.

This Court reviews a trial court's award of damages following a bench trial for clear error. *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002). Mere difference of opinion is insufficient to set aside a nonjury award. *Id*. Rather, "[c]lear error exists

where, after a review of the record, the reviewing court is left with a firm and definite conviction that a mistake has been made." *Id*.

"Where the fact of liability is proven, difficulty in determining damages will not bar recovery. The Court must do the best with what is presented to it." *Willis v Ed Hudson Towing, Inc*, 109 Mich App 344, 350; 311 NW2d 776 (1981) (internal citation omitted). However, "remote, contingent, and speculative damages cannot be recovered in Michigan in a tort action." *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 96; 706 NW2d 843 (2005). Although damages are not speculative merely because they are not calculated with mathematical precision, "[a] plaintiff asserting a cause of action has the burden of proving damages with reasonable certainty, and damages predicated on speculation and conjecture are not recoverable." *Id*.

In the present case, the trial court awarded plaintiff Thompson $5,000 for loss of personal property. In support of this award, the court specifically found that plaintiff lost bedroom sets, a table and chairs, toys and clothes. In deciding this issue, the trial court noted that there was a conflict between the items taken, the items replaced, and the income available to support the replacement. Although plaintiff Thompson submitted computer printouts to support valuation of the cost of replacement items, the trial court noted the disparity in available income and the lack of supporting receipts. Consequently, to resolve this issue, the trial court relied on credibility assessments of the witnesses, including the testimony of plaintiffs and neighboring witnesses. This Court must be deferential to the trial court's determination of witness credibility. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 99; 535 NW2d 529 (1995). Thus, the trial court awarded plaintiff Thompson damages for property loss substantially lower than the estimated loss in excess of $30,000.00. Contrary to defendant's argument, plaintiff Thompson was competent to provide testimony regarding property value. See *Willis, supra* at 350. Given that a court need not calculate damages with mathematical precision and "must do the best with what is presented to it[,]" *id*., this award was proper.

In contrast, we vacate the award of $1,000 to plaintiff Rowell for lost property. The trial court concluded that this plaintiff "may" have suffered some loss of property. The court offered no further elaboration regarding what property Rowell may have lost or even regarding the value of such property. Consequently, this award was based on mere speculation and conjecture.[1]

In addition to awarding economic damages, the court also awarded $25,000 to Thompson and $1,500 to each minor child for emotional distress. These awards were improper. The general rule is that compensatory damages are not awarded for emotional distress caused by the

[1] We note that the trial court repeatedly had to instruct this witness to enunciate for the record because apparently plaintiff Rowell was grunting in response to questions posed by the lawyers. Moreover, when asked regarding replacement purchases and receipts, plaintiff Rowell testified that he could not provide receipts for replacement merchandise because the receipts were in the rental property at the time of the lockout. Despite repeated attempts to clarify this inconsistent testimony, the issue was not clarified or resolved.

mere loss of things. *Bernhardt v Ingham Regional Medical Ctr*, 249 Mich App 274, 281; 641 NW2d 868 (2002).

Defendant next contends that the court erred in awarding damages to Rowell, Temple, Rice, and Cieria under § 2918(2) of the anti-lockout statute because these plaintiffs were not tenants. While we agree that these plaintiffs were not tenants under § 2918(2), we do not agree that the anti-lockout statute precludes recovery for these plaintiffs. This Court reviews issues statutory interpretation de novo. *Ayar v Foodland Distributors*, 472 Mich 713, 715; 698 NW2d 875 (2005).

MCL 600.2918(2) provides in relevant part:

> Any tenant in possession of premises whose possessory interest has been unlawfully interfered with by the owner, lessor, licensor, or their agents shall be entitled to recover the amount of his actual damages or $200.00, whichever is greater, for each occurrence and, where possession has been lost, to recover possession. Unlawful interference with a possessory interest shall include:
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> * * *
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> (c) A change, alteration, or addition to the locks or other security devices on the property without forthwith providing keys or other unlocking devices to the person in possession[.]

This Court has previously defined "tenant" in this section "to include the individual or individuals who pay consideration to the landlord for the right to occupy rental property, rather than the members of the larger family unit dwelling in the rental property." *Nelson v Grays*, 209 Mich App 661, 665; 531 NW2d 826 (1995). Under this definition, *Nelson* excluded minor children living with the lessee as tenants under the anti-lockout statute. *Id*. at 666. Consequently, the minor children living with Thompson, who were not parties to the lease agreement, were not tenants. Similarly, Rowell, who was not a party to the lease, also was not a tenant under this section. Thus, the trial court erred in awarding these parties damages due to a violation of § 2918(2) of the anti-lockout statute as a matter of law. However, as plaintiffs argue on cross-appeal, the non-tenant plaintiffs were entitled to recover damages under § 2918(1) of the anti-lockout statute.

MCL 600.2918(1) provides:

> Any person who is ejected or put out of any lands or tenements in a forcible and unlawful manner, or being out is afterwards held and kept out, by force, if he prevails, is entitled to recover 3 times the amount of his actual damages or $200.00, whichever is greater, in addition to recovering possession.

We note that this Court has found that even where occupants are not tenants, § 2918(1) requires a landlord to resort to judicial process to remove such occupants rather than "summarily" removing them by the exercise of "self-help." *De Bruyn Produce Co v Romero*, 202 Mich App 92, 103; 508 NW2d 150 (1993). Thus, we conclude that § 2918(1) contemplates recovery for non-tenant plaintiffs in circumstances like those asserted by plaintiffs here.

Regardless of this determination, the default established defendant's liability under the anti-lockout statute. *Wood v Detroit Automobile Inter-Ins Exch*, 413 Mich 573, 578; 321 NW2d 653 (1982). Therefore, it was proper for the trial court to consider whether the non-tenant plaintiffs sustained damages even though § 2918(2) was not controlling. This Court "will not reverse the decision of a trial court if it reached the right result, albeit for the wrong reason." *Ellsworth v Hotel Corp*, 236 Mich App 185, 190; 600 NW2d 129 (1999). Thus, the appropriate award for each non-tenant plaintiff under § 2918(1) is $200.

Plaintiffs argue that the trial court should have awarded treble damages under § 2918(1). Because the court erroneously relied upon § 2918(2), the trial court failed to consider whether treble damages are appropriate in this case for Thompson's loss of personal property. On remand the trial court should consider whether an award of treble damages to Thompson is appropriate.

Plaintiffs next assert that the trial court erred in dismissing their claims under a theory of intentional infliction of emotional distress (IIED) with respect to the minor children and for violations of the MCPA. We disagree. "It is an established principle of Michigan law that a default settles the question of liability as to well-pleaded allegations and precludes the defaulting party from litigating that issue." *Wood*, *supra* at 578. When the trier of fact's intention is ascertainable, manifest errors of form, and sometimes matters of substance, may be corrected to conform to the trier of fact's verdict. See *Standard Oil Co v Gonser*, 331 Mich 29, 33-34; 49 NW2d 45 (1951). A technical objection that is without merit cannot be sustained. *Boyce v Peterson*, 84 Mich 490, 493; 47 NW 1095 (1891).

Review of the record reveals that the trial court was aware of the fact that a default judgment had entered and the issue to be resolved following the series of evidentiary hearings was the amount of damages due plaintiffs. After the trial court ruled regarding the amount of damages to be awarded, plaintiffs' counsel commented that the trial court was dismissing any remaining counts. The trial court responded that dismissal or not had "no efficacy." Review of the entire record reveals that plaintiffs' objection places form over substance and is without merit. The trial court was aware of the issues to be determined at the hearings and concluded that a damage award was not warranted for the claims that plaintiffs characterized as

"dismissed." This conclusion is buttressed by our independent examination of the record.[2] Accordingly, this challenge is without merit.[3]

Plaintiffs next argue that the trial court erred in excluding evidence of plaintiff Thompson's income and receipts for "replacement" items Thompson purchased. We disagree. A trial court's decision to exclude evidence is reviewed for an abuse of discretion. *Dep't of Transportation v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999). "[W]hether evidence may be given on rebuttal, or after the defense has rested, even though it could and should properly have been offered in chief is, as a rule, recognized to be a matter within the discretion of the trial court, which will not be interfered with by the appellate court, unless a clear abuse of the discretion is shown." *Gilchrist v Mystic Workers of the World*, 196 Mich 247, 254; 163 NW 10 (1917). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). MRE 611(a) provides that "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

On the second day of the damages hearing, while still presenting his case in chief, plaintiffs' counsel twice requested permission to recall Thompson to clarify issues "such as her income and what not" given that he had obtained exhibits verifying her income. In denying this request, the court noted that Thompson had already been excused and explained that it was improper for a party to recall witnesses during its case in chief after the party had an opportunity to prepare the witness to testify a second time. The court elaborated that Thompson's financial ability to replace the items she claimed to have lost would not influence its determination of what items Thompson actually lost. After defendant presented his case in chief, plaintiffs' counsel again requested permission to recall Thompson as a rebuttal witness and to present receipts showing that Thompson had purchased "replacement" items. In denying this request, the trial court ruled that this would not constitute rebuttal evidence because whether Thompson purchased "replacement" items did not prove that she had, in fact, lost such items.

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[2] Moreover, review of the record reveals that, at the conclusion of testimony, the trial court expressly noted that it "didn't see any strong evidence of emotional distress under any of the circumstances." However, two months later when ruling on damages, the trial court rendered an award of $25,000 to plaintiff Thompson and $1,500 to each minor child. Although liability was admitted because of the default judgment, the testimony presented regarding damages for emotional distress was merely that plaintiff Thompson was "very upset" because of the lock out from the home. A minor plaintiff testified that leaving the home made him sad. Irrespective of the characterization of the trial court's ruling, under the circumstances, a damage award for IIED was not supported by the proofs.

[3] Although we conclude that the trial court did not err in failing to award damages under the MCPA, we note that MCL 445.911(2) provides for the award of a reasonable attorney fee. In light of the entry of the default judgment, on remand, the trial court should address this provision.

The court's failure to admit this evidence was not an abuse of discretion. The only issues at the hearing concerning economic damages were what property, if any, plaintiffs lost and the value of that property. Thompson's income and the amount she spent on so-called "replacement" items purchased after leaving the house did not make it more or less likely that she lost the items she claimed to have lost. Thus, additional evidence of Thompson's income (Thompson had previously testified that she earned around $4,000 in 2002 and 2004) and receipts of "replacement" items were irrelevant, and further testimony on these issues would have amounted to a needless consumption of time. Thus, the exclusion of this evidence was proper.

Plaintiffs also assert that the trial court erred in striking its trial brief (to which was attached Thompson's income tax return and receipts of the "replacement" items) because the court had granted plaintiffs permission to "submit anything [they] choose to submit . . . ."[4] In context, however, the court's statement was not an open-ended invitation for plaintiffs to submit any documentation they desired as implied by plaintiffs' argument. Rather, as the court previously indicated, plaintiffs were permitted to submit a trial brief specifically on the issue of what damages Thompson sustained under MCPA. Thus, this argument fails.

In any event, plaintiffs failed to present the evidence at issue when Thompson initially testified and waited to raise these issues until the second day of the evidentiary hearing. Given that the first day of the evidentiary hearing preceded the second day by a month, it appears that plaintiffs' failure to present such evidence was the result of negligence. "[E]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence." *Farm Credit Services, PCA v Weldon*, 232 Mich App 662, 684; 591 NW2d 438 (1998). Consequently, plaintiffs' claim fails.

Plaintiffs also contend that the trial court erred in admitting the testimony of witnesses concerning affirmative defenses because the default had already determined the issue of liability. Plaintiffs are not entitled to relief on this issue. In a bench trial, the judge, sitting as the trier of fact, is "presumed to possess an understanding of the law that allows him to understand the difference between admissible and inadmissible evidence or statements of counsel." *In re Forfeiture of $19,250*, 209 Mich App 20, 31; 530 NW2d 759 (1995). At the start of the hearing, plaintiffs' counsel asserted that a witness for the defense would attempt to dispute liability. Defense counsel asserted that the witness would address property for which plaintiffs sought recovery. The trial court acknowledged the admission of liability and noted the limited purpose for the testimony. Moreover, when rendering its verdict, the trial court acknowledged that the damages were allowed following the entry of the default judgment. Thus, plaintiffs' claimed error is without merit.

In summary, we affirm the order insofar as it awards economic damages to plaintiff Thompson, but reverse the portion of the order awarding economic damages to plaintiff Rowell and noneconomic damages to plaintiffs Thompson, Temple, Rice, and Cieria. We remand this

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[4] Plaintiffs claim the trial court failed to examine exhibits 26 and 27 of their trial brief. The trial brief, however, contains only 21 exhibits.

case for the trial court to award Rowell, Temple, Rice, and Cieria $200 each under the anti-lockout statute and to consider whether Thompson was entitled to treble damages under the anti-lockout statute. The trial court should also consider whether plaintiffs are entitled to attorney fees under the MCPA.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood